Zaibar Auto (M) Sdn Bhd & Anor v Shell Malaysia Trading Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W 02–464–1995
GOPAL SRI RAM, SITI NORMA YAAKOB AND ABDUL MALEK JJCA
18 MARCH 1996

Civil Procedure *— Summary possession of land — Applicability — Who may give consent or grant licence to occupy land — Whether aggrieved parties were squatters on land — Whether court could invoke summary jurisdiction conferred by O 89 of Rules of the High Court 1980 against them — Rules of the High Court 1980 O 89*

Pursuant to an agreement dated 23 January 1991, the respondent purchased a piece of land in Kuala Lumpur ('the land') from Metro Murni Sdn Bhd ('Metro Murni'). The transfer was registered in the respondent's favour on 21 October 1991. It was also a term of the agreement of sale and purchase that the respondent shall have vacant possession of the land, and the land was vacant at the time the respondent became its registered proprietor. The respondent wanted to construct a petrol station on the property but it was unable to obtain approval for this from the relevant authorities. Later, the respondent was shocked to discover that several buildings which included an office and a showroom for cars had been built on the land, and that the first and the second appellants were carrying on business in one of the buildings. The respondent, through its solicitors, wrote to the appellants and all those in occupation of the land asserting that they were trespassers and demanding that they vacate it. However, the appellants denied that they were trespassers. The respondent took out a summons under O 89 of the Rules of the High Court 1980 ('the RHC') and claimed the summary relief made available by that order. The appellants resisted the respondent's summons. The appellants justified their occupation on the ground that they were in occupation of the land with the consent of Metro Murni, the respondent's predecessor in title, and that the summary jurisdiction conferred by the order could not therefore be invoked against them. They alleged that in February 1993, the first appellant had purchased all the shares of Metro Murni from the latter's previous shareholders. It had then terminated the sale to the respondent through a letter of termination, retook possession of the land from the respondent, and let the appellants into possession subsequently. The judge who heard the summons made an order for vacant possession against the appellants in reliance upon the summary jurisdiction. The appellants appealed. The point that arose in this appeal was the applicability of the summary jurisdiction conferred upon the court by O 89 of the RHC to the facts of this case.

Held, dismissing the appeal:

(1) Order 89 r 1 of the RHC has always been read as applying to squatters. It does not apply to tenants who are holding over, one who enters upon land or who remains in occupation with the consent of the applicant under the order or any predecessor in title of such an applicant, or persons who are in occupation under a legitimate expectation of receiving, from the state authority, issue documents of title to the portions they occupy (see p 226E–H); *Bohari bin Taib & Ors v Pengarah Tanah Galian Selangor* [1991] 1 MLJ 343.

(2) Consent or licence to occupy land may only be given by one who is empowered by law to give such consent or to grant such a licence. In the ordinary case, it is the registered proprietor, in whom is vested the right of ownership, who may give consent or grant a licence to occupy (see p 227A–B).

(3) In the present case, Metro Murni had divested itself of all rights which the law conferred upon it as a registered proprietor of the land when the relevant registering authority endorsed the appropriate memorial in the respondent's favour upon the register document of title. Thereafter, all rights of ownership were vested in the respondent, and no person other than one authorized by the respondent could validly grant consent to the land being occupied or grant licence to a third party (see p 227E).

(4) There was no consent given or licence granted by the respondent or anyone under its authority. The appellants' occupation of the land was derived from the prima facie unlawful act of Metro Murni in retaking possession. The purported termination of the sale and purchase agreement by Metro Murni was a futile act because of the doctrine of indefeasibility that operated in the respondent's favour pursuant to s 340 of the National Land Code 1965 (see p 227F).

(5) The protection given by the relevant words that appeared in O 89 did not extend to the present appellants. The facts which the appellants had relied upon disclosed that they were, and had always been, in unlawful occupation of the land. In other words, they were trespassers (see pp 228I and 229A).

[Bahasa Malaysia summary

Menurut suatu perjanjian bertarikh 23 Januari 1991, penentang telah membeli sebidang tanah di Kuala Lumpur ('tanah tersebut') daripada Metro Murni Sdn Bhd ('Metro Murni'). Pindahmilik itu telah didaftarkan atas nama penentang pada 21 Oktober 1991. Adalah merupakan terma perjanjian jual beli itu bahawa penentang akan mempunyai milikan kosong tanah tersebut, dan tanah tersebut adalah kosong pada masa penentang menjadi tuan punya berdaftar.

Penentang hendak mendirikan sebuah stesen minyak atas harta itu tetapi tidak berjaya memperolehi kelulusan untuk berbuat demikian daripada pihak berkuasa yang relevan. Kemudiannya, penentang terkejut apabila mengetahui bahawa beberapa buah bangunan, termasuk sebuah pejabat dan bilik pameran untuk kereta telah didirikan di atas tanah tersebut, dan bahawa perayu pertama dan kedua menjalankan urusniaga dalam salah sebuah bangunan. Penentang, melalui peguamcaranya, telah menulis kepada perayu-perayu dan semua pihak yang menduduki tanah tersebut, menyatakan bahawa mereka adalah penceroboh dan menuntut supaya mereka mengosongkannya. Walau bagaimanapun, perayu-perayu telah menafikan bahawa mereka adalah penceroboh. Penentang telah mengeluarkan suatu saman di bawah A 89 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan menuntut relief terus yang disediakan oleh aturan itu. Perayu-perayu telah mencabar saman penentang. Perayu-perayu telah memberi justifikasi penghunian mereka atas alasan bahawa mereka berada dalam penghunian tanah tersebut dengan kebenaran Metro Murni, pendulu dalam hakmilik penentang, dan bahawa bidang kuasa terus yang dikurniakan oleh aturan itu dengan demikian tidak boleh digunakan terhadap mereka. Mereka mengatakan bahawa dalam bulan Februari 1993, perayu pertama telah membeli semua syer Metro Murni daripada pemegang saham Metro Murni terdahulu. Kemudiannya, ia telah menamatkan jualan kepada penentang menerusi sepucuk surat penamatan, mengambil semula milikan tanah tersebut daripada penentang, dan membenarkan perayu-perayu mengambil milikan selepas itu. Hakim yang mendengar saman itu telah membuat satu perintah untuk milikan kosong terhadap perayu-perayu berdasarkan bidang kuasa terus. Perayu-perayu membuat rayuan. Perkara yang timbul dalam rayuan ini ialah pemakaian bidang kuasa terus yang dikurniakan kepada mahkamah oleh A 89 KMT kepada fakta kes ini.

Diputuskan, menolak rayuan itu:

(1) Aturan 89 k 1 KMT sentiasanya dibaca sebagai terpakai terhadap setinggan-setinggan. Ia tidak terpakai kepada penyewa-penyewa yang memeganglepas masa, seseorang yang masuk ke dalam atau terus menduduki tanah dengan persetujuan pemohon di bawah aturan itu atau mana-mana pendulu dalam hakmilik pemohon demikian, atau orang yang menduduki di bawah satu jangkaan sah untuk menerima dokumen hakmilik keluaran daripada pihak berkuasa negeri terhadap bahagian yang didudukinya (lihat ms 226E–H); *Bohari bin Taib & Ors v Pengarah Tanah Galian Selangor* [1991] 1 MLJ 343.

(2) Persetujuan atau izin untuk menduduki tanah hanya boleh diberikan oleh seseorang yang diberi kuasa oleh undang-undang untuk memberi persetujuan atau izin sedemikian. Dalam kes biasa, tuan punya berdaftar yang telah diletakkan hak

pemunyaanlah yang boleh memberi persetujuan atau izin untuk menduduki (lihat ms 227A–B).

(3) Dalam kes ini, Metro Murni telah melucutkan semua hak yang dikurniakan kepadanya oleh undang-undang sebagai suatu tuan punya berdaftar tanah tersebut apabila pihak berkuasa mendaftar yang relevan mengendorskan memorial yang memihak kepada penentang dengan sewajarnya pada dokumen hakmilik daftaran. Sesudah itu, semua hak pemunyaan telah diletakhak ke atas penentang, dan tidak ada sesiapa selain daripada seorang yang diberikuasa oleh penentang boleh memberi persetujuan secara sah ke atas penghunian tanah tersebut atau memberi izin kepada pihak ketiga (lihat ms 227E).

(4) Tiada persetujuan atau izin yang telah diberikan oleh penentang atau sesiapa yang diberi kuasa olehnya. Penghunian perayu-perayu ke atas tanah tersebut adalah berpunca daripada tindakan Metro Murni yang menyalahi undang-undang secara prima facie apabila ia mengambil semula milikan. Penamatan perjanjian jual beli oleh Metro Murni adalah satu tindakan sia-sia akibat doktrin ketakbolehan disangkal yang beroperasi dengan memihak kepada penentang menurut s 340 Kanun Tanah Negara 1965 (lihat ms 227F).

(5) Perlindungan yang diberikan oleh perkataan-perkataan relevan yang muncul dalam A 89 tidak merangkumi perayu-perayu dalam kes ini. Fakta yang diharapkan oleh perayu-perayu mendedahkan bahawa mereka telah, dan sentiasa telah, menduduki tanah tersebut secara menyalahi undang-undang. Dalam ertikata lain, mereka adalah penceroboh (lihat ms 228I dan 229A).]

[*Editorial Note*: The appellants have appealed to the Federal Court vide Civil Appeal No 08–15–96.]

Notes

For cases on summary possession of land, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3251–3525.

Case referred to

Bohari bin Taib & Ors v Pengarah Tanah Galian Selangor [1991] 1 MLJ 343

Legislation referred to

Federal Territory (Planning) Act 1982
National Land Code 1965 s 340
Rules of the High Court 1980 O 89 r 1

Appeal from: Originating Summons No S6–24–1184–93 (High Court, Kuala Lumpur)

A *TJ Su* (*Cheah Teh & Su*) for the appellants.
Robert Lazar (*HK Choong* with him) (*Catherine Choong & Co*) for the respondent.

Cur Adv Vult

B **Gopal Sri Ram JCA** (delivering the judgment of the court): We heard and dismissed this appeal on 22 January 1996. The reasons for our decision now follow.

The short point that arises in this appeal is the applicability to the facts of this case of the summary jurisdiction conferred upon the court by O 89 of the Rules of the High Court 1980. Those facts, all of which are C undisputed, are as follows.

The respondent is the registered proprietor of a piece of land held under Certificate of Title No 9018 for Lot No 55, in the town and district of Kuala Lumpur which we will, throughout this judgment, refer to as 'the said land'. It purchased the said land from a company called Metro Murni D Sdn Bhd ('Metro Murni') under an agreement dated 23 January 1991. The transfer was registered in the respondent's favour on 21 October 1991. That registration conferred upon the respondent, by reason of the provisions of the National Land Code 1965 ('the Code'), a bundle of rights including the right to immediate possession of the said land. Additionally, it was a term of the agreement of sale and purchase that the E respondent shall have vacant possession of the said land.

The said land was, at the time the respondent became its registered proprietor, indeed vacant. There was an old building on it. But it was unoccupied. The respondent wanted to construct a petrol station on the property but it was unable to obtain approval for this from the relevant F authorities.

The first time the respondent heard anything further about the said land was when the Kuala Lumpur City Hall issued an enforcement notice dated 12 February 1993 to the respondent, citing the latter for a breach of the Federal Territory (Planning) Act 1982. The gist of the complaint was G that a building had been constructed upon the said land without any approval from City Hall.

On receiving this notice, the respondent caused inquiries to be made and was quite shocked by what it discovered. The gate that was meant to keep trespassers out of the property had been broken. The old building H that had been on the land had been demolished. In its place were several other buildings which included an office and a showroom for cars. There were two sign-boards atop one of the buildings. One was that of the first appellant; the other of the second appellant. It was quite plain for all to see that the appellants were carrying on business on the said land. There is no doubt that they were doing so without the respondent's consent.

I The respondent lost no time in consulting solicitors who wrote to the appellants and all those in occupation of the said land asserting that they (the appellants) were trespassers and demanding that they vacate it. The

appellants too consulted solicitors. There then followed some correspondence between the respondent's solicitors and those of the appellants. In a gist, the appellants denied that they were trespassers and alleged that the sale of the said land to the respondent had been aborted. A

The respondent then took out a summons under O 89 and claimed the summary relief made available by that order. The appellants resisted the respondent's summons. The appellants' resisted the summons on the following facts which they led in evidence. B

In February 1993, the first appellant purchased all the shares of Metro Murni from the latter's previous shareholders. Thereafter, Metro Murni (in reality, the first appellant) proceeded to terminate the sale to the respondent. Following the letter of termination, Metro Murni retook possession of the said land from the respondent. It then let the appellants into possession. C

The appellants, accordingly, justify their occupation on the ground that they are upon the land with the consent of or by licence of the respondent's predecessor in title. This was the entire basis on which the case was argued before the High Court and before us. D

The learned judge who heard the summons made an order for vacant possession against the appellants. We are entirely in agreement with the decision of the learned judge and her reasons therefor. E

In order to appreciate the arguments advanced in support of the appeal, it is necessary to hearken to the words of r 1 of O 89 which is in the following terms:

> Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order. F

The rule has always been read, as it ought to be read, as applying to squatters, pure and simple. It does not apply to tenants who are holding over. It does not apply to one who enters upon land or who remains in occupation with the consent of the applicant under the order or any predecessor in title of such an applicant. It does not apply to persons who are in occupation under a legitimate expectation of receiving, from the state authority, issue documents of title to the portions they occupy: see *Bohari bin Taib & Ors v Pengarah Tanah Galian Selangor* [1991] 1 MLJ 343. G H

It was argued for the appellants that they were in occupation of the land with the consent of Metro Murni, the respondent's predecessor in title, and that the summary jurisdiction conferred by the order could not therefore be invoked against them. It followed, so the argument went, that the judge was wrong in making the order for possession in reliance upon the summary jurisdiction. I

A The fallacy that lies at the heart of this rather ingenious argument lies in the proposition that consent or licence to occupy land may only be given by one who is empowered by law to give such consent or to grant such a licence. In the ordinary case, it is the registered proprietor, in whom is vested the right of ownership, who may give consent or grant a licence to B occupy. However, cases may arise where the registered proprietor has placed such power in the hands of some other person, for example, a tenant of the land in question. In such a case, the consent or licence granted by that other may bind the registered proprietor and so render the occupation by the occupier lawful.

C But the facts relied upon by the appellants do not come within either category. This is not a case where the appellants came onto the said land with Metro Murni's consent or licence before the respondent acquired title by registration. Had that happened, Metro Murni, as the registered proprietor of the said land, would have had the right to deal with the land and any rights of occupation which they created in favour of a third party D may have been binding upon the respondent as the successor in title.

However, in the present case, Metro Murni had divested itself of all rights which the law conferred upon it as a registered proprietor of the said land. That happened when the relevant registering authority endorsed the appropriate memorial in the respondent's favour upon the register document E of title. Thereafter, all rights of ownership were vested in the respondent and no person other than one authorized by the respondent could validly consent to the said land being occupied by a third party or grant a valid licence to such an occupant.

However, as earlier observed, there was no consent given or licence F granted by the respondent or anyone under its authority. In fact, the said land was vacant when the respondent purchased it. The appellants came onto it much later. And their occupation of it is derived from the prima facie unlawful act of Metro Murni in retaking possession otherwise than in accordance with law or with procedure established by law.

G The purported termination of the sale and purchase agreement by Metro Murni was, of course, a futile act because of the doctrine of indefeasibility that operates in the respondent's favour. Any attack upon its title, in order to succeed, must come within the parameters of s 340 of the Code. And it is only after Metro Murni has successfully established its title to the said land is it entitled to reassume proprietary rights over it. H

If we were to accede to the submissions of appellants' counsel, it would amount to driving a coach and four through s 340 of the Code. No registered proprietor will be safe. All that has to be done is for the vendor to terminate a sale and purchase agreement, to retake possession of property without the aid of a court and then to place someone else in occupation. I That, with respect, is not and has never been the law.

In our judgment, the protection given by the relevant words that appear in O 89 does not extend to the present appellants. The facts which

the appellants have relied upon disclose that they are, and have always been, in unlawful occupation of the said land. In a word, they are trespassers.

Despite the eloquence of counsel for the appellants, we were left unconvinced that the machinations employed by the first appellant to place itself in occupation of the said land were lawful. The appeal, therefore, singularly lacked any merit, and was accordingly dismissed with costs. All orders made by the judge were affirmed. We also ordered that the deposit paid into court by the appellants be paid out to the respondent to account of taxed costs.

Order accordingly.

Reported by Isabel Liong